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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-304

RICHARD A. GORDON, individually and as President of INDEPENDENT INVESTOR PROTECTIVE LEAGUE, an unincorporated association, and in behalf of the membership thereof and in behalf of all persons similarly circumstanced,

Petitioners,

against

NEW YORK STOCK EXCHANGE, INC., AMERICAN STOCK EXCHANGE, INC., and MERRILL, LYNCH, PIERCE, FENNER & SMITH, INC. and BACHE & COMPANY, INC., individually and as representatives of all member firms of the New York Stock Exchange and American Stock Exchange,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES

RICHARD A. GORDON, individually and as President of INDEPENDENT INVESTOR PROTECTIVE LEAGUE, an unincorporated association, and in behalf of the membership thereof and in behalf of all persons similarly circumstanced,

Petitioners,

-against-

NEW YORK STOCK EXCHANGE, INC., AMERICAN STOCK EXCHANGE, INC., and MERRILL, LYNCH, PIERCE, FENNER & SMITH, INC. and BACHE & COMPANY, INC., individually and as representatives of all member firms of the New York Stock Exchange and American Stock Exchange,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners herein pray that a Writ of Certiorari be granted by this Court to review a determination of the United States Court of Appeals for the Second Circuit, made June 28th, 1974, which affirmed a determination of the United States District Court for the Southern District of New York, made December 3rd, 1973 which granted the

defendants' Motion for Summary Judgment upon the ground that the Securities and Exchange Commission had primary jurisdiction over the fixing of Commission Rates for Stock Trades. The Petitioners contend that the determination of the Court is not well taken and should be reversed.

JURISDICTION

Jurisdiction of this Court to review the determination of the United States Court of Appeals for the Second Circuit is given by 28 USC 1254(1). This petition is being made by the plaintiffs in the cause below, parties to said action.

TIME

The determination of the United States Court of Appeals for the Second Circuit was made on June 28th, 1974. This petition is being filed within ninety (90) days from the date of said determination.

REASONS WHY THIS PETITION SHOULD BE GRANTED

This case involves almost every Rule of this Court warranting the grant of a Petition for a Writ of Certiorari. This case is:

1—Of great public importance. Both the US Department of Justice and the SEC submitted briefs on opposite sides of the question.

2—There is a conflict between circuits in the application of the legal principles involved.

3—There are grave constitutional questions involved in this appeal.

4—There is a conflict between the determination of the Court of Appeals for the Second Circuit and prior determinations of this Court including *Silver v. New York Stock Exchange*, 373 US 341.

FACTS

This case involves the legality of the "fixed commission rates" charged by the New York Stock Exchange and the American Stock Exchange.

Since the inauguration of stock trading on the defendant Stock Exchanges the exchanges have had various rules providing for the fixation of commission rates to a certain minimum amount. The Rules further provide that any members of the said Exchanges who violate the Rules and charge Commission Rates lower than the fixed amount will be expelled from the Exchanges.

The Exchanges also have "Anti-Rebate" rules which prevent division of commissions with non-members of the said Exchanges, also under penalties of expulsion from the exchanges.

The defendant Stock Exchanges are the primary market

for the sale of securities to the general public. While there is some trading "off the board" where the facilities of the defendant Stock Exchanges are not used for "listed securities" and there is also an active "over the counter" market for unlisted securities the primary securities markets are the defendant exchanges.

In order to properly survive in the Securities Business, therefore, it is necessary to be a member of the defendant Exchanges or at least one of them.

Use of the facilities of the defendant Exchanges are limited to "members" thereof. The "memberships" in the defendant exchanges are limited and a "seat" (or membership) can be purchased only by buying some other party's "seat". The price paid for such a "seat" is generally determined by the trading volume at the particular time that the seat is sold.

The plaintiff Gordon is an investor in Securities traded on the defendant Exchanges. The plaintiff Independent Investor Protective League is an organization of investors who invest in securities listed on the defendant Exchanges. The members of the Independent Investor Protective League and the plaintiff Gordon are vitally affected by the fixation of Commission Rates by the defendant Exchanges.

The Securities and Exchange Commission (organized in 1933) until about the time of the commencement of this action, took no action with respect to the fixation of Commission Rates. Indeed, even after making a "letter

determination" that it would "not object" to certain practices with respect to (1) instituting a "surcharge" on transaction of less than 1000 shares, (2) instituting a "volume discount" on large transactions and (3) instituting a negotiated commission schedule on transactions in excess of $500,000 (now $300,000), the Commission, in two cases where judicial review was sought on that issue, represented to the Court that it, in fact, had no jurisdiction to fix Commission Rates. In the Commission's brief filed in connection with the dismissal of the Petition for Review in the United States Court of Appeals for the Second Circuit taken by the plaintiffs against the "letter opinion" stating that the practices suggested by the New York Stock Exchange would not be objected to by the Commission stared as follows:

> "*** The Commission's letter of comment to the Exchange did not order the Exchange, petitioners, or any other person to do or to refrain from doing anything. Nor did the letter "approve" or "disapprove" the Exchange's proposals.***"

This brief resulted in a dismissal, without opinion, of the plaintiff's Petition to Review the determination of the Securities and Exchange Commission. (Docket 1984-71).

Petitioners then sued the Commission in the United States District Court for the District of Columbia. Again the Commission, in its brief seeking dismissal of the Complaint, stated as follows:

> "*** However, the question of the type and extent of immunity that may flow from Commission determinations regarding exchange rules and practices need not be decided in this case. The appropriate forum for resolution of that question is in an antitrust action against a self-regulatory organization challenging its rules or the administration of such rules.***"

This brief also resulted in a dismissal of the plaintiffs' complaint.

The last determination of the Commission, made after hearings with respect to Commission Rates, and which permitted fixed commission rates to remain in effect was again challenged in a Petition for Review to the United States Court of Appeals for the Second Circuit. The plaintiffs again attempted to challenge this determination and again was met with a Motion to Dismiss on the ground that the Commission had not issued a reviewable order. This motion was again granted by the Court of Appeals without opinion.

Despite the recited prior history the District Court and the Court of Appeals, determined that the Securities and Exchange Commission had full jurisdiction over the fixing of Commission Rates, that, as a result, the defendants had full anti-trust immunity, and, as a result, the petitioners had no cause for Complaint.

POINT ONE

THE EXTENT OF ANTI-TRUST IMMUNITY ON THE PART OF THE INVESTMENT COMMUNITY BY REASON TO THE SECURITIES ACTS IS A QUESTION OF GREAT PUBLIC IMPORTANCE WHICH SHOULD BE REVIEWED BY THIS COURT.

The Court of Appeals, in affirming the determination of the District Court, in its opinion, stated that:

> "*** Whether the minimum rate structure presently employed by the nation's stock exchanges enjoys immunity from attack under the antitrust laws is a question of such importance that we need not belabor its significance.***"

Where a question of great public importance is presented, which has not been previously decided; this Court will, in general, grant certiorari to consider the question. See for example, *Engel v. Vitale*, 370 US 421 (prayer in schools), *International Brotherhood of Teamsters v. Vogt*, 354 US 284 (power of a state to enjoin picketing), *FCC v. RCA*, 346 US 86, *Textile Workers Union of America v. Lincoln Mills of Alabama*, 353 US 448, *NLRB v. Lion Oil Co.*, 352 US 282, *Sperry v. State of Florida*, 373 US 379 (question of State Bar's power to exclude a non-member of State Bar from practicing before Federal Agency), *Theard vs. US*, 354 US 278, *J.I. Case Co. v. Borak*, 377 US 426, *SEC v. Variable Annuity Life*

Insurance Co. of America, 359 US 65 (power of SEC over variable annuity contracts) and *Otis & Co. v. SEC,* 323 US 624 (extent of SEC regulatory power).

In this case, it is submitted, that a determination by this Court as to the nature and extent, if any, of the anti-trust immunity enjoyed by the defendant stock exchanges and brokerage community must be made by this court.

POINT TWO

CERTIORARI SHOULD BE GRANTED IN THIS CASE TO DETERMINE THE CONFLICT BETWEEN CIRCUITS OF THE PRESENT CASE AND THE *THILL* CASE WITH RESPECT TO THE NATURE OF ANTI-TRUST IMMUNITY WITH RESPECT TO STOCK EXCHANGE RULES.

The present action stands for the proposition that the defendant Stock Exchanges, and the brokerage community, are immune from the anti-trust laws so long as the SEC has regulatory power over such rules (even if the power has not been exercised). In the Seventh Circuit case of *Thill Securities Corp. v. New York Stock Exchange,* 433 Fed. (2nd) 264, certiorari denied, 401 US 994, the Court there held that the "anti-rebate" rule (which impliedly permitted fixation of commission rates) was not immune from the antitrust laws. The Second Circuit, in distinguishing *Thill* also stated as follows:

"*** And it would be difficult to maintain that the effect of the anti-rebate rule on investor protection, fair dealing in securities or fair administration of an exchange is in any respect different from the practice of commission rate fixing. *** Thus, to the extent our decision today is inconsistent with *Thill*, we find ourselves constrained to disagree with the holding there announced.***"

Where an important question has been differently decided by two different circuits this Court will, in general, grant certiorari to resolve the conflict. See, for example, *FTC v. Flotill Products, Inc.*, 389 US 179, *Willingham v. Morgan*, 389 US 179, *US v. Donruss Co.*, 393 US 297, and *SEC v. National Securities, Inc.*, 393 US 453. The last-cited case involved the grant of a Petition for a Writ of Certiorari to determine questions with respect to the administration of the Securities Laws.

POINT THREE

THERE ARE GRAVE CONSTITUTIONAL QUESTIONS INVOLVED IN THIS APPEAL.

The determination of the Court of Appeals heavily relied upon Section 19 of the Securities and Exchange Act of 1934 where Section 19(b) provides that

"*** The Commission is further authorized, *if after making appropriate request in writing to a national securities exchange that such exchange*

effect on its own behalf specified changes in its rules and practices, and after appropriate notice and opportunity for hearing the Commission determines that such exchange has not made the changes so requested, and that such changes are necessary or appropriate for the protection of investors or to insure fair dealing in securities traded in upon such exchange, by rules or regulations or by order to alter or supplement the rules of such exchange [insofar as necessary or appropriate to effect such changes] in respect of such matters as [9] the fixing of reasonable rates of commission . . ." (emphasis supplied).

However this is not the manner in which the Commission proceeded. The Commission considered a mere "letter" from the Exchanges with respect to this matter, gave no notice to the Exchanges to change their rules, and conducted no adversary-type hearing with respect to such changes. Indeed, after the rates involved were "not objected to" the Commission represented to the Courts that it had no power to fix commission rates and that its "suggestions" amounted to non-reviewable determinations.

Such a construction of the law would involve an unconstitutional application of the Statute in violation of the Fifth Amendment to the Constitution of the United States. This, of course, was not the intention of Congress in enacting the Securities Acts. The Commission would have the appropriate power, to determine that Commission

Rates, in *selected cases,* were "unreasonable". However it was not given the power to permit a horizontal conspiracy with respect to fixed commission rates or to merely give the stock exchanges "letter opinions" that certain practices were to be tolerated by the Commission and, by that device, preclude Judicial Review of such determinations.

POINT FOUR

THE DETERMINATION OF THE COURT OF APPEALS IS IN CONFLICT WITH THE DETERMINATION IN THE SILVER CASE DECIDED BY THIS COURT.

This Court, in the landmark case of *Silver vs. New York Stock Exchange,* 373 US 341, rejected the contention of the New York Stock Exchange that it enjoyed a "blanket exemption" from the antitrust laws because it was a "regulated industry" subject to control by the Securities and Exchange Commission. The Court in *Silver* held that there was no such general exemption from the anti-trust laws given to the Securities industry. Indeed, this Court held on pages 359-60 of the opinion as follows:

> "* * * Since the antitrust laws serve, among other things, to protect competitive freedom, i.e., the freedom of individual business units to compete unhindered by the group action of others, it follows that the antitrust laws are peculiarly appropriate as a check upon anticompetitive acts of exchanges which conflict with their duty to keep their

operations and those of their members honest and viable. . . ."

In the present case, it must be conceded, based upon the SEC's own position before two different courts, that it did not "fix" the commission rates involved. The removal of fixed commission rates and the permitting of such commission rates to be set by normal competitive forces is not necessary to "make the securities acts work".

It is interesting to note the subsequent history of the fixed commission rate battle since the determination of the Court of Appeals in this case. The Securities and Exchange Commission (apparently mindful of the issues in this suit) has determined, tentatively, that fixed commission rates would be phased out in April 1975 and that rates would be permitted to be set competitively after that time. In the meantime, however, the New York Stock Exchange now joined by the American Stock Exchange, has petitioned the Commission to permit a further increase in the Commission Rates to "small investors". The petition is based upon the admitted premise that the brokerage community needs more income and must be shielded from competitive forces. The Exchanges also admit that they attempted to raise commission rates to large customers and were rebuffed. Therefore they seek to raise rates to the group of the population not able to protect themselves.

The defendant exchanges have further publicly stated that they will do all that is necessary to prevent the institution of competitive commission rates in 1975 and will

petition the Securities and Exchange Commission for such relief.

POINT FIVE

THIS COURT SHOULD REVERSE THE DETERMINATION OF THE COURT OF APPEALS AND, AT THE VERY LEAST, REMAND THIS CASE FOR TRIAL.

The function of a Petition for a Writ of Certiorari is to demonstrate to the Court, the reasons why such review should be granted. The Petition generally does not include an extensive study of the law involved. However, for the information of the Court, a capsule exposition of the applicable law will be set forth.

There is no question that, if the SEC did not exist, the fixation of commission rates by the defendant Stock Exchanges coupled with the penalties imposed for violation of the fixed minimum commissions to be charged, would be *per se* violations of the anti-trust laws, Section 1 of the Sherman Act (15 USC 1) prohibits:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.* * *"

That the fixation of minimum commission rates, with penalties for non-compliance thereof, is a *per se* violation

of the anti-trust laws is clear. See, for example, *Premier Electric Construction Company vs. Miller Davis Co.*, 422 Fed. (2nd) 1132, certiorari denied 400 US 828, *Albrecht vs. Herald Co.*, 390 US 145, *US vs. General Motors Corp.*, 384 US 127, *Northern Pacific RR Co. vs. US*, 356 US 1, *U.S. vs. McKesson & Robbins, Inc.*, 351 US 305, and *Schwegmann Bros. vs. Calvert Distillers Corp.*, 341 US 384. *Schwegmann* is of importance for the proposition that a State statute cannot override the anti-trust laws.

The Securities Acts expressly permitted parties to have all rights that they previously had under other statutes and clearly there was no intention to repeal the anti-trust laws.

The challenged fixed commission rates are also a violation of Section 2 of the Sherman Act (15 USC 2) which reads in part as follows:

> "Every person who shall monopolize, or attempt to monopolize, or combine and conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States or with foreign nations, shall be guilty of a misdemeanor. * * *"

Various stock exchange rules provide for limited access to the facilities of the exchanges, prevent sharing of commissions with non-members of the exchanges, etc.

Such action has been held to be a violation of Section 2 of the Sherman Act (*US vs. National Association of Real*

Estate Boards, 339 US 485). This case is of interest in that it involved the fixation of commission rates by a trade association almost precisely what is involved in the present case.

Thus, the sole justification for anti-trust immunity on the part of the defendants lies within the ambit of the Securities Acts. However, such immunity must be given strictly in accordance with the *Silver and Thill* rationale to the effect that any rule of an exchange is immune from the anti-trust laws only is necessary to make the Securities Exchange Act work and even then only to the minimum extent necessary, even if the challenged rule has been submitted to the SEC pursuant to the Commission's rule 17a-8 or is subject to Commission action under the Securities Exchange Act. (See the 1972 "Securities Industry Study" of the Subcommittee on Commerce and Finance of the House of Representatives Committee on Interstate and Foreign Commerce.)

The above report also held as follows:

> "* * * The Subcommittee does not believe that the Congress intended in 1934 nor does it intend today that the limited review power granted to the Commission in the Securities Exchange Act should insulate the rules of national securities exchanges from antitrust scrutiny.* * *"

The 1973 Securities Industry Study of the Subcommittee on Securities of the Senate Committee on Banking, House

and Urban Affairs held as follows:

> "* * * Anti-competitive conduct of self-regulatory bodies is immune from antitrust attack only if the conduct is necessary to make the statutory scheme of regulation work and then only to the minimum extent necessary. This immunity is not increased or broadened in the event that the action in question is subject to SEC review or even if it is in fact approved by the SEC. *The SEC has no power to immunize anti-competitive self-regulatory conduct from the operations of the anti-trust laws* (See page 227 of said report) (emphasis supplied).

The report of a committee of Congress, of course, is highly significant in the determination of "legislative intent" with respect to a statutory enactment.

The Congress, at the present time, is considering various legislation with respect to the Securities Industry. However, any such legislation, which has not been passed as yet, could not, of course, relate to conduct which has previously taken place since that would constitute an "ex post facto" law in violation of the United States Constitution.

CONCLUSION

THIS COURT SHOULD GRANT CERTIORARI TO REVIEW THE QUESTIONS PRESENTED IN THIS PETITION.

Respectfully submitted,

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Appendix

OPINION OF U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

71 Civ. 1496 — Memorandum No. 40086

RICHARD A. GORDON, individually and as President of INDEPENDENT INVESTORS PROTECTIVE LEAGUE, an unincoprorated association, and in behalf of the membership thereof and in behalf of all persons similarly circumstanced,

Plaintiff.

-against-

NEW YORK STOCK EXCHANGE, INC., and MERRILL LYNCH PIERCE FENNER & SMITH, INC. and BACHE & COMPANY, INC., individually and as representatives of all member firms of the NEW YORK STOCK EXCHANGE AND AMERICAN STOCK EXCHANGE,

Defendants.

LASKER, D.J.

In this action, brought by Richard A. Gordon, individually and as President of Independent Investors

Protective League, against the New York Stock Exchange, the American Stock Exchange ("the Exchanges") and their member firms, plaintiff alleges several violations of the Robinson-Patman Act and the Sherman Act, to the detriment of "small investors" (those ineligible for either "volume discounts" on trades of over 1,000 shares, or negotiated rates on trades above the $500,000 (now $300,000) "breakpoint").

Specifically, plaintiff attacks the Exchanges' practices of making their facilities available only to members and of limiting the number of memberships; he also alleges that members have conspired with the Exchanges to fix rates for small investors at an unreasonably high level in view of the actual cost of executing a trade; that negotiated rates and volume discounts are set at unreasonably low levels in view of the actual costs of execution; and that this scheme unlawfully discriminates against small investors. In short, plaintiff makes a number of related claims, the essence of which is a broadside attack on the present commission structure of the Exchanges.

Defendants have moved for an order dismissing the action and granting summary judgment on the grounds that the practices complained of are within the exclusive jurisdiction of the Securities and Exchange Commission, that the SEC, acting pursuant to §19(b) of the Exchange Act of 1934, 15 U.S.C. §78s(b), has been actively regulating these practices, and that, consequently, the practices are exempt from the provisions of the antitrust law so that the court is without subject matter jurisdiction.

I.

We deal first with plaintiff's related claims regarding the Exchanges' practices of limiting the number of memberships, and denying the use of their facilities to non-members unless they pay the same rate of commission charged the general public (Complaint, Paragraph 17).

As to the first claim, plaintiff lacks standing to sue since he has not met the threshold requirement of §4 of the Clayton Act: "Any person who shall be injured in his business or property by reason of any thing forbidden in the anti-trust laws may sue therefor . . ." (15 U.S.C. §15). Since it is undisputed that plaintiff has never made application for membership in either defendant Exchange, he cannot be heard to complain that memberships are arbitrarily limited. See *Billy Baxter, Inc. v. Coca-Cola Company*, 431 F.2d 183, 187 (2d Cir. 1970), *cert. denied*, 401 U.S. 923 (1971); *Data Digests, Inc. v. Standard & Poor's Corporation*, 43 F.R.D. 386, 387-8 (S.D.N.Y. 1967).

Plaintiff's second claim must also fail in view of the clear language of the Exchange Act of 1934 to the effect that non-members' access to Exchange facilities is limited. Section 3(a)(3) states:

> "The term 'member' when used with respect to an exchange means any person who is permitted either to effect transactions on the exchange without the services of another person acting as

broker, or to *make use of the facilities of an exchange for transactions thereon without payment of a fee or with the payment of a commission or fee which is less than that charged the general public,* and includes any firm transacting a business as broker or dealer of which a member is a partner, and any partner of such firm." (emphasis added)

The fact that the limited membership characteristic of the Exchanges inheres in their very nature has been recognized by the Supreme Court, *Silver v. New York Stock Exchange,* 373 U.S. 341, 350-51 (1963) and this Circuit, *Robert W. Stark, Jr., Inc. v. New York Stock Exchange, Inc.,* 346 F. Supp. 217, 228 (S.D.N.Y. 1972), *aff'd per curiam,* Dkt. No. 72-1810, Slip Op. 928 (2d Cir. Aug. 28, 1972) CCH Sec. L. Rep. ¶93,607.

II.

Plaintiff's claims of price discrimination predicated upon the Robinson-Patman Act, 15 U.S.C. §13(a), are without merit. The Act requires that the alleged price discrimination be in connection with "commodities of like grade and quality". The authorities are clear that services and intangibles (such as stock trade executions) are not "commodities" within the meaning of the Act. *Columbia Broadcasting System v. Amana Refrigeration,* 295 F.2d 375 (7th Cir. 1961); *Baum v. Investors Diversified Services, Inc.,* 409 F.2d 872, 875 (7th Cir. 1969), and cases cited therein.

III.

Plaintiff's remaining claims relating to the commission rate structure of the Exchanges pose the question whether the Exchanges, subject to SEC supervision, can fix commission rates without incurring Sherman Act liability. It is, of course, conceded by defendants that any such immunity must be provided, if at all, by the Securities & Exchange Act of 1934.

The question of the extent to which the 1934 Act exempts the Exchanges from the anti-trust laws has not been considered in this Circuit since *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963). That case involved a non-member broker who had secured private wire connections with certain New York Stock Exchange firms. The Exchange had approved Silver's connections on a temporary basis, but subsequently ordered them disconnected without notice or hearing. After observing that the Exchange's actions, absent justification from the Exchange Act, would have constituted a *per se* violation of the Sherman Act, the *Silver* court sought to reconcile the "antitrust aim of eliminating restraints on competition with the effective operation of a public policy contemplating that securities exchanges will engage in self-regulation which may well have anti-competitive effects in general and in specific applications." (*Silver* at 349.)

Noting that the Exchange Act does not give the commission jurisdiction to review *particular instances of enforcement* of Exchange rules, the Court stated that

consequently the question of antitrust exemption did "not involve any problem of conflict or co-extensiveness of coverage with the agency's regulatory power," and that court review of the circumstances there presented "is therefore not at all incompatible with the fulfillment of the aims of the [Act]". (*Silver* at 359.) The court concluded that the severance of the private wires occurred under "totally unjustifiable circumstances" (*Silver* at 361) and that no policy of the Exchange Act was served by denial of notice and opportunity for hearing.

In so holding, however, *Silver* did not specify the circumstances in which a federal district court must decline jurisdiction to avoid a possible conflict with the commission, and specifically reserved decision on the possible anti-trust immunity of exchanges where "review of exchange self-regulation [is] provided through a vehicle other than the antitrust laws. . . ." (p. 360).

We hold that this court lacks jurisdiction to entertain an anti-trust attack on the commission structure of the Exchanges, since the fixing of commissions falls squarely within the congressional policy of exchange self-regulation embodied in the 1934 Act. Since the Act expressly directs the SEC to supervise the "fixing of reasonable rates of commission" (§19(b)(9)), we believe this is the "different case," on which *Silver* reserved decision, where review of exchange self-regulation is available "through a vehicle other than the antitrust laws" (*Silver*, p. 360).

In so holding, we are in disagreement with the Seventh Circuit, See *Thill Securities Corp. v. New York Stock*

Exchange, 433 F.2d 264 (7th Cir. 1970), *cert. denied*, 401 U.S. 994 (1971), a decision to which we return later on.

We believe that while *Silver* quite properly punctured the umbrella of anti-trust immunity claimed by the Exchange, it did not intend Congress' unique self-regulatory scheme to be totally dampened by the continuous interference of an anti-trust court. We read *Silver* as holding that certain limited areas of Exchange regulation—such as potentially anti-competitive and arbitrary conduct directed at non-members—are properly interfered with by a reviewing court since the Act purports to regulate only the conduct of registered exchanges (and their members) with regard to the public, rather than the entire securities business. But *Silver* also contemplates a certain zone of anti-trust immunity in the regulatory process where there is little threat of such arbitrary and discriminatory activity.

Without venturing to describe the full contours of this immunity, we believe that the Exchange Act, as construed by *Silver*, left the power to fix commission rates within the exclusive jurisdiction of the Exchange, subject to commission supervision.

This construction finds ample support in the language of *Silver*. The court describes the Exchanges as "by their nature bodies with a limited number of members" (p. 350) with a "federally mandated duty of self-policing" (p. 352).

> "The pattern of governmental entry . . . was by no means one of total displacement of the exchanges' traditional process of self-

> regulation . . . Thus the Senate Committee Report stressed that the 'initiative and responsibility for promulgating regulations pertaining to the administration of their ordinary affairs remain with the exchanges themselves. It is only where they fail adequately to provide protection to investors that the Commission is authorized to step in and compel them to do so." S. Rep. No. 792 [73d Cong., 2d Session (1934)] at 13.

The court continues at (360-61) that:

> "The entire public policy of self-regulation, beginning with the idea that the Exchange may set up barriers to membership, contemplates that the Exchange will engage in restraints of trade which might well be unreasonable absent sanction by the Securities Exchange Act. Without the oversight of the Commission to elaborate from time to time on the propriety of various acts of self-regulation, the Exchange is left without guidance and without warning as to what regulative action would be viewed as excessive by an antitrust court. . . . But, under the aegis of the rule of reason, traditional antitrust concepts are flexible enough to permit the Exchange sufficient breathing space within which to carry out the mandate of the Securities Exchange Act."

The clear import of this language is that the Exchange Act sanctions certain "anti-competitive" features of the

Exchanges so long as they further the policy of self-regulation and are subject to Commission supervision, guided by the "rule of reason". Indeed, we note that *Silver* sets out at some length (p. 354-6, n. 9) the welter of Exchange rules restricting members' relations with non-members, which were there in issue.

In holding that the *manner* of *enforcing* these rules was illegal, *Silver* never intimates that the rules themselves are subject to anti-trust attack, and indeed recognizes the necessity for them (p. 354-6).

The facial language of the Exchange Act gives the Exchange and the Commission the power to "fix" commission rates. Section 6(d) of the Act requires that registered exchange adopt rules "just and adequate to insure fair dealing and to protect investors;" that is, §6(d) mandates self-regulation. As *Silver* observes "[t]he general dimensions of the duty of self-regulation are suggested by §19(b) of the Act, 15 U.S.C. §78s(b), which gives the Commission power to order changes in exchange rules respecting a number of subjects . . ." (p. 352). §19(b) recites:

> "Sec. 19. *** The Commission is further authorized, if after making appropriate request in writing to a national securities exchange that such exchange effect on its own behalf specified changes in its rules and practices, and after appropriate notice and opportunity for hearing, the Commission determines that such exchange has

> not made the changes so requested, and that such changes are necessary or appropriate for the protection of investors or to insure fair dealing in securities traded in upon such exchange, by rules or regulations or by order to alter or supplement the rules of such exchange (insofar as necessary or appropriate to effect such changes) in respect of such matters as *** (9) *the fixing of reasonable rates of commission, interest, listing, and other charges;* (10) *minimum units of trading . . . ;* and (13) similar matters." (emphasis added)

We recognize that the legislative history of the 1934 Act is, perhaps typically, ambiguous as to Congress' intent regarding the Exchanges' long-standing practice of fixing commission rates. As Professor Baxter of Stanford Law School has noted:

> "[t]he attention of Congress in 1934 was focused on problems of dishonesty, manipulation, and solvency, and . . . no coherent congressional purpose was articulated concerning the problems of intra-industry competitive structure." Baxter, New York Stock Exchange Fixed Commission Rates: A Private Cartel Goes Public, 22 Stan. L. Rev. 675, 685 (1970).

However, Congress clearly was aware of the Exchanges' rate-fixing practices, since both House and Senate debates on the Act specifically refer to the fixing of commissions. See, e.g., 78 Cong. Rec. 8087, 8092, 8490, 8493-94 (1934).

Nevertheless, however unclear the Congressional debate in 1934 may be as to the permissibility of fixing commissions, we believe the history of Exchange rate-regulation since the passage of the Act is entitled to substantial weight. As to the proper construction of the Act, we cannot overlook the fact that Exchange regulation of fixed commissions has existed virtually unchallenged for nearly 40 years since the passage of the Act.

In the case most in point, *Kaplan v. Lehman Brothers*, 250 F. Supp. 562 (N.D. Ill. 1966), *aff'd* 371 F.2d 409 (7th Cir. 1967), shareholders of five mutual funds brought a treble damage action against the New York Stock Exchange and several stock brokerage firms claiming that the fixing of minimum commissions was a *per se* violation of the Sherman Act. The Court of Appeals affirmed an award of summary judgment for the defendants since, as the trial court noted, plaintiff's *per se* allegation was defective in light of the weighing process required under *Silver*. Though *Kaplan* is distinguishable on its facts, the court there recognized the possibility of a conflict of jurisdiction with the Commission. Its comments are applicable here since the gist of the complaint in both cases is that plaintiff paid higher rates than would have obtained in the absence of Exchange rate-fixing.

> "The plaintiffs have complained of the rates because they are fixed. If they had complained instead that the rates were too high, they would find no support in the antitrust laws. The remedy for a level of rates which is unreasonably high rests with the SEC. Ratemaking is a matter for which

> the courts are ill-equipped and accordingly a matter traditionally committed to an administrative agency. [citation omitted]. The SEC since its establishment has exercised this power of review over Exchange rates of commission, and it has inaugurated a regular system of reporting from Exchange members to furnish the necessary information.
>
> . . . To leave the determination of reasonableness to the prospective decisions of the agency which is especially qualified and responsible for the general supervision of the industry will assure the intention of Congress as well as the interests of the public." (250 F. Supp. at 566).

We note that, beginning with the 1963 *Special Study of The Securities Markets*, the SEC and the Exchanges have undertaken intensive examination of Exchange commission structures and related matters. In 1968, the SEC initiated public hearings on the commission rate structure.

Certain rate adjustments, such as the volume discount, and the interim charge, and experiments with negotiated commissions have resulted from these activities. Most significant, the SEC recently announced, in its Release 10383 (September 11, 1973), its intention to terminate the Exchange practice of fixing minimum commissions on all securities transactions after April 30, 1975, unless the Exchange in the meantime alters its rules to the same effect. It is fair to infer that the SEC is continuing to

exercise its jurisdiction actively over rate-setting, pursuant to §19(b)(9) of the Act.

Moreover, recent developments in Congress regarding the commission structure support the holding here. The Senate recently rejected amendments to the 1934 Act which would have mandated the elimination of fixed commissions within two years. See 119 Cong. Record, S11385-6, June 18, 1973. It is reasonable to infer from the proposal of these amendments that Congress did not believe fixed commissions were already illegal under the anti-trust laws, and, of course, the rejection of the amendments suggests that Congress does not now regard fixed rates as offensive to the Exchange Act or the anti-trust laws.

Finally, we come to the recent decision in *Thill Securities Corp. v. New York Stock Exchange*, 433 F.2d 264 (7th Cir. 1970), *cert. denied*, 401 U.S. 994 (1971).

In *Thill*, a non-member broker-dealer attacked the anti-rebate rule of the New York Stock Exchange as violative of the Sherman Act. The Seventh Circuit reversed the grant of summary judgment in favor of the New York Stock Exchange predicated on a claim of immunity, and remanded the case to the trial court for further evidence on the effects of the anti-competitive acts complained of, the extent to which the rule was subject to actual review by the SEC, and the extent to which the anti-rebate rule was "necessary to make the Securities Exchange Act work." (*Thill*, at 270).

We believe that *Thill* is distinguishable from our case. First, the Act contains no specific directive to the SEC to supervise member-non-member relations; second, there

was before the court no record of active SEC supervision in the area; third, the court thought the power to refuse to share commissions with non-members was a "weapon that can be used to injure a particular competitor" (p. 270) and the plaintiff had alleged that the anti-rebate rule had in fact been unevenly applied.

Indeed, in distinguishing *Kaplan, supra*—another Seventh Circuit case—the *Thill* court placed considerable weight on the distinction it perceived between the non-discriminatory application of fixed commission rates (at issue in *Kaplan*) uniformly charged to the *public*, and the application of rules governing rebates with non-member broker-dealers (p. 270).

We must add, if it is not already clear, that if *Thill* is to be read as holding that an anti-trust court has concurrent jurisdiction with the SEC over *all* potentially anti-competitive practices and rules, we disagree.

For the foregoing reasons, defendants' motion for summary judgment is granted.

In view of our decision here, we do not consider plaintiff's motion for a class action determination.

It is so ordered.

Dated: New York, New York
December 3rd, 1973.

MORRIS E. LASKER
U.S.D.J.

FOOTNOTE

In *Thill Securities Corp., v. New York Stock Exchange*, Civ. 63-C-264 (E.D. Wisc. 1973), the post-trial brief of the United States, as intervenor, arguing the *illegality* of fixed commission, and the anti-rebate rule concedes that "it cannot be said that Congress intended to outlaw fixed minimum commissions in passing the 1934 Act." (Post-trial brief at pp. 8-9).

OPINION OF UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AFFIRMING OPINION OF DISTRICT COURT

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1045—September Term, 1973.

(Argued June 5, 1974 Decided June 28, 1974.)

Docket No. 74-1043

RICHARD A. GORDON, individually and as President of Independent Investors Protective League, an unincorporated association, and in behalf of the membership thereof and in behalf of all persons similarly circumstanced,

Plaintiff-Appellant,

v.

NEW YORK STOCK EXCHANGE, INC., AMERICAN STOCK EXCHANGE, INC. and MERRILL, LYNCH, PIERCE, FENNER & SMITH, INC. and BACHE & COMPANY, INC., individually and as representatives of all member firms of the New York Stock Exchange and American Stock Exchange,

Defendants-Appellees.

Before:

KAUFMAN, *Chief Judge,*
MANSFIELD and MULLIGAN, *Circuit Judges.*

Appeal from an order entered in the United States District Court for the Southern District of New York, Morris E. Lasker, *Judge,* granting summary judgment and dismissing complaint principally alleging that the fixing of stock exchange commission rates violates the antitrust laws.

Affirmed.

I. WALTON BADER, New York, New York (Bader and Bader, New York, New York, on the brief), *for Appellant.*

WILLIAM E. JACKSON, New York, New York (Milbank, Tweed, Hadley & McCloy, Lord, Day & Lord, Brown, Wood, Fuller, Caldwell & Ivey, New York, New York, on the brief; Isaac Shapiro, Mark L. Davidson, John J. Loflin, James B. May, New York, New York, of counsel), *for Appellees.*

SEYMOUR H. DUSSMAN, Attorney, Department of Justice, Washington, D.C. (Thomas E. Kauper, Assistant Attorney General, on the brief), as *Amicus Curiae urging reversal.*

LAWRENCE E. NERHEIM, General Counsel, Securities Exchange Commission, Washington, D.C. (Walter P. North, Associate General Counsel, Frederic T. Spindel, Special Counsel, Theodore L. Freedman, Attorney, on the brief), as *Amicus Curiae urging affirmance.*

KAUFMAN, *Chief Judge:*

Whether the minimum rate structure presently employed by the nation's stock exchanges enjoys immunity from attack under the antitrust laws is a question of such importance that we need not belabor its significance. The Supreme Court in *Silver* v. *New York Stock Exchange,* 373 U.S. 341 (1963), although subjecting the application of an exchange rule to antitrust scrutiny, acknowledged that if there were Securities Exchange Commission [SEC] jurisdiction to review a challenged rule, a different case would arise con-

cerning antitrust exemption. We are here presented with that different case.

The complaint itself provides all the facts necessary for our disposition. Richard A. Gordon brought this private antitrust action on April 2, 1971, on his own behalf and for a purported class of small investors, against the New York Stock Exchange, Inc. [NYSE], the American Stock Exchange, Inc. [Amex], and two representative member firms of the exchanges,[1] alleging that the exchanges' fixed minimum commission system violated the Sherman Act, 15 U.S.C. §§ 1 and 2 (1970), and the Robinson-Patman Act, 15 U.S.C. § 13(a) (1970). More specifically, we read Gordon's complaint to have alleged: (1) that the exchange rules providing for a volume discount from the minimum commission rate in the case of large transactions, together with negotiated rates only on portions of orders in excess of $500,000,[2] and the interim surcharge on transactions involving less than 1000 shares,[3] amounted to a system of price discrimination in violation of the Robinson-Patman Act, 15 U.S.C. § 13(a) (1970),[4] and the Sherman Act, 15 U.S.C. §§ 1, 2 (1970); and (2) that the fixed commissions charged those unable to avail themselves of negotiated rates constituted a scheme of price-fixing, contrary to the provisions of the Sherman Act, 15 U.S.C. §§ 1, 2 (1970).[5]

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1 Merrill, Lynch, Pierce, Fenner & Smith, and Bache & Co., Inc.

2 NYSE Const. Art. XV, § 2 (1971); *subsequently amended;* Amex. Const., Art. VI, § 2 (1971), *subsequently amended.*

3 NYSE Rule 383 (1971), *repealed* April 1, 1974; Amex Rule 396 (1971), *amended* April 1, 1972.

4 Gordon also claimed that the volume discounts were "unreasonably low prices for the purpose of destroying competition or eliminating a competitor," in violation of 15 U.S.C. § 13a (1970). Although the district court made no finding in this regard, plaintiff does not press the point on appeal.

5 The complaint also challenged rules which limited exchange membership, and which denied discounted commission rates to nonmember

Without reaching the merits of Gordon's principal claims, the district court found the challenged practice of fixing commission rates not within the jurisdiction of an antitrust court since judicial oversight of this particular aspect of exchange self-regulation had been displaced by the review power vested in the SEC under § 19(b) of the Securities Exchange Act of 1934 [1934 Act], 15 U.S.C. § 78s(b) (1970). Accordingly, the district court granted the defendants' motion for summary judgment, and dismissed the complaint.[6] For the reasons set forth below, we agree.

Since Gordon's other claims are essentially frivolous,[7] we turn directly to his principal allegation that the exchange practice of fixing commission rates violated the Sherman Act. Any analysis of the interrelation of the antitrust laws and the system of supervised exchange self-regulation embodied in the 1934 Act must begin with *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963). The Court was there asked to decide whether the NYSE's

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brokers who used exchange facilities. The district court concluded that these claims were frivolous. We agree, since § 3(a)(3) of the Securities Exchange Act of 1934, 15 U.S.C. § 78c(a)(3) (1970), clearly contemplates limitations on both exchange membership and non-member access to exchange facilities.

6 Because the district court considered affidavits and exhibits annexed as well as the pleadings, it properly concluded that the motion to dismiss should be treated as one for summary judgment. Rule 12(b), F.R. Civ. P.

7 We agree with the district court that there is no precedent for the assertion that brokerage services are "commodities" within the meaning of the Robinson-Patman Act, 15 U.S.C. § 13(a) (1970).

Gordon raises on appeal for the first time the claim that the combination of surcharges, volume discounts, and negotiated rates violates 15 U.S.C. § 13(c) (1970), as an allowance or commission not granted for services rendered. Although we decline to entertain the claim because it was not raised in the district court, we note that § 13(c) proscribes such practices only "in connection with the sale or purchase of goods, wares, or merchandise . . . ."

enforcement of an exchange rule without notice or hearing, resulting in the removal of a nonmember's private telegraph wires from member offices—concededly a group boycott—was subject to antitrust scrutiny. Seeking to achieve the requisite accommodation between the antitrust laws and the 1934 Act's policy of exchange self-regulation, Mr. Justice Goldberg, speaking for a majority of the Court, formulated the following test:

> Repeal [of the antitrust laws] is to be regarded as implied only if necessary to make the Securities Exchange Act work, and even then only to the minimum extent necessary.

373 U.S. at 357.

In *Silver*, the Court concluded that exercise of its antitrust jurisdiction was proper for two reasons. Because there was no possibility of SEC review of the challenged act—disconnection of Silver's wires to member offices—assertion of judicial oversight would have resulted in no conflict, between agency and court, rendering cumbersome and inconsistent the system of administrative regulation. 373 U.S. at 358. Moreover, denial of antitrust jurisdiction on the facts presented in *Silver* would have left no governmental body to perform the antitrust function of preventing an injury to competition which could not be justified as furthering legitimate self-regulatory ends. *Id.* at 358-61. Though the Court hinted that some breathing space should be left the exchange for unsupervised self-regulation, if found inexcusable the failure to provide the procedural safeguards of notice and hearing. *Id.* at 361-67.

The instant case, of course, is *toto caelo* different from *Silver*, for there is here governmental oversight of the fixing of commission rates, vested expressly in the SEC pursuant to § 19(b)(9) of the 1934 Act, 15 U.S.C. § 78s(b)(9)

(1970). And, as we have indicated, the *Silver* Court recognized that a "different case" would be posed if the exchange practice allegedly violative of the antitrust laws were subject to control by the SEC. Although the *Silver* rationale might well authorize us to ground our holding here on the existence of SEC review power, we do not rely upon that authority alone to support a finding of antitrust immunity. Rather, we are of the view that both the language and the history of the 1934 Act, together with the sound policy behind supervised exchange self-regulation, mandate the conclusion that Congress intended to exempt from the antitrust laws the exchange practice of fixing commission rates.

Section 19(b) of the 1934 Act states, in pertinent part:

> The Commission is further authorized, if after making appropriate request in writing to a national securities exchange that such exchange effect on its own behalf specified changes in its rules and practices, and after appropriate notice and opportunity for hearing, the Commission determines that such exchange has not made the changes so requested, and that such changes are necessary or appropriate for the protection of investors or to insure fair dealing in securities traded in upon such exchange or to insure fair administration of such exchange, by rules or regulations or by order to alter or supplement the rules of such exchange (insofar as necessary or appropriate to effect such changes) in respect of such matters as . . . (9) the fixing of reasonable rates of commission, interest, listing, and other charges . . .

It is clear from this language that the "congressional aim in supervised self-regulation is to insure fair dealing and to protect investors from harmful or unfair trade

practices," *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Ware*, 414 U.S. 117, 130 (1973). It is equally plain that Congress considered the "fixing of reasonable rates of commission" to be essential to meeting these goals, for it listed this factor explicitly among the twelve items so denominated. Finally, and most importantly for this jurisdictional dispute between an antitrust court and the SEC, Congress vested in the Commission the power to determine whether changes are "necessary" in the exchanges' rate-fixing practices to assure fulfillment of the goals of the Act. Accordingly, Congress defined in § 19(b) those matters fundamental to achieving "the aims of the Securities Exchange Act," *Silver* v. *New York Stock Exchange*, 373 U.S. at 361, and accorded the SEC the authority to make whatever changes respecting those matters are "necessary or appropriate" (§ 19(b)) to effectuate those aims —*i.e.*, in the terms of the *Silver* test, "necessary to make the Securities Exchange Act work." 373 U.S. at 357.

If the discussion in *Silver* of a core of exchange self-regulation necessary to make the 1934 Act work, and thus immune from application of the antitrust laws, is to be given any meaningful application, we are of the view that it must have reference to the practices enumerated in § 19(b), and in this instance to the fixing of reasonable rates of commission. The Supreme Court also recognized in *Silver* that the exercise of antitrust jurisdiction, where it conflicted with a power of review expressly delegated to the SEC, could render ineffective the supervised self-regulatory scheme designed to accomplish the aims of the 1934 Act. 373 U.S. at 358-61. Frustration of those aims would be the inevitable consequence of duplicative or inconsistent standards announced contemporaneously by courts and Commission.

That Congress intended Commission-supervised exchange self-regulation to be of central importance in the

scheme of the 1934 Act is emphasized by the legislative history of the Act. Both House and Senate reports stress the broad responsibility left with the exchanges to administer their own affairs. H.R. Rep. No. 1383, 73d Cong., 2d Sess. 15 (1934); S. Rep. No. 792, 73d Cong., 2d Sess. 13 (1934). The grant of this unique self-regulatory power, however, was conditioned upon the creation of the SEC, invested with broad discretionary powers equal to the complex and changing nature of the problems arising in the securities industry. *Cf.* H.R. Rep. No. 1383 at 6-7. Rather than charge the Commission with oversight of specific instances of abuse, Congress authorized it to condition an exchange's right to register upon its enactment of rules "just and adequate to insure fair dealing and to protect investors." 15 U.S.C. § 78f(d) (1970). And as to several specific matters inextricably linked with "fair dealing" and "protection of investors" from harmful or unfair trade practices, the Commission was empowered by § 19(b) to order exchanges to make such amendments in their rules as the Commission found necessary to carry out the purposes of the Act.

Yet the legislative history of the Act does not simply indicate the central significance of supervised self-regulation in effectuating the purposes of the Act. Concerning the practices here challenged, we find most persuasive Congress's manifest recognition of the Commission's competence to serve the necessary antitrust objective of preserving competition, by delegating to it control over practices which, but for § 19(b) of the 1934 Act, would be per se violations of the antitrust laws. Those familiar with the development of antitrust law know that seven years before the Securities Exchange Act was passed, the Supreme Court decided that price-fixing was a per se violation of the Sherman Act. *United States* v. *Trenton Potteries Co.*, 273 U.S.

392 (1927). Despite this clear holding, the 1934 Act explicitly provides for "the *fixing* of reasonable rates of commission, interest, listing, and other charges" [emphasis added]. 15 U.S.C. § 78s(b)(9) (1970). Reference to the Senate hearings dispels any doubt on this score, for they make plain the congressional awareness that this provision "would permit the Commission to fix rates." *Hearings on S. Res. 84 (72d Cong.) and S. Res. 56 and S. Res. 97 (73d Cong.) Before the Senate Comm. on Banking and Currency*, 73d Cong., 1st and 2d Sess., pt. 16, at 7705 (1934) (statement of Samuel Untermyer). Moreover, the practice in the securities field of industry-wide agreement on minimum fees—dating back to 1792, *see* SEC, Report of Special Study of Securities Markets, H.R. Doc. No. 95, 88th Cong., 1st Sess., pt. 2, at 295 (1963)—was repeatedly acknowledged both in committee hearings, *see Hearings on S. Res. 84 (72d Cong.) and S. Res. 56 and S. Res. 97 (73d Cong.) Before Senate Comm. on Banking and Currency*, 73d Cong., 2d Sess., pt. 13, at 6075, 6080-81 (1934); *Hearings on H.R. 7852 and H.R. 8720 Before the House Comm. on Interstate and Foreign Commerce*, 73d Cong., 2d Sess., at 423-34 (1934), and in the debates on the Act, *see, e.g.*, 78 Cong. Rec. 8087, 8091-92, 8490, 8493-94 (1934).

We draw two conclusions from this delegation of power over exchange commission rates. By permitting so potentially harmful a practice as rate-fixing, Congress recognized that the exchange commission system bore crucially upon achievement of the goals of the 1934 Act. Further, by placing in the hands of the SEC the regulation of rate-fixing—a practice the effects of which the Supreme Court acknowledged its inability to assess, *see United States* v. *Trenton Potteries, supra*, 273 U.S. at 398—Congress made clear its judgment of the Commission's competence to assume the central role in assuring investor protection and exchange fair dealing.

Exemption from the antitrust laws with regard to the fixing of minimum rates of commission is not only mandated by both the language and the legislative history of the 1934 Act, and in particular § 19(b)(9), but is grounded as well in sound policy considerations governing regulation of the securities industry. Of principal concern is the danger, clearly contemplated by *Silver*, 373 U.S. at 358, that courts and the SEC would subject exchanges to repetitive or conflicting standards. There is little question but that the commission rate structure is the keystone of the economic viability of the brokerage industry, and a matter of vital importance to individual investors as well. Steering effectively between the often competing interests of "seller" and "buyer"—reducing the barriers to investor trading, while at the same time assuring a return sufficient to preserve brokerage capacity—becomes far too hazardous with two hands on the tiller.

Nor are the hazards of repetition and conflict in this case a matter of mere speculation, as a review of the wide-reaching and systematic character of recent SEC action regarding rate regulation makes evident. In 1963, following the congressional mandate embodied in 15 U.S.C. § 78s (d), the SEC published its extensive Report of Special Study of Securities Markets, H.R. Doc. No. 95, 88th Cong., 1st Sess. (1963), dealing among other matters with the practice of fixing stock exchange commission rates. Recent Commission action with regard to the particular practices challenged by Gordon began in 1959, with a request to the NYSE to study the possible introduction of a volume discount. *See* SEC Securities Exchange Act Release No. 5889 (Feb. 20, 1959). Comment was requested on both NYSE and SEC proposals on January 26, 1968. SEC Securities Exchange Act Release No. 8239 (Jan. 26, 1968). On May 28, 1968, the NYSE was asked either to implement a suggested commission schedule incorporating volume discounts for

round lot portions over 400 shares, or to eliminate minimum commissions on portions of orders in excess of $50,000, before September 15 of the same year. Public hearings also were commenced on May 28, 1968, to determine "changes in the present commission rate structure . . . required to benefit the investing public." SEC Securities Exchange Act Release No. 8324 (May 28, 1968). The same release requested that other exchanges make "appropriate" changes similar to those demanded of the NYSE. The Commission thereafter notified the NYSE that the requirements of Release No. 8324 would be satisfied by provision for a volume discount on orders in excess of 1000 shares, Letter of Manuel F. Cohen to Robert W. Haack (August 30, 1968), and on September 4, 1968, it extended the mandated effective date to December 5, 1968. SEC Securities Exchange Act Release No. 8399 (Sept. 4, 1968).

Commission approval was given on August 2, 1970, for the interim surcharge challenged by Gordon, in order "to provide emergency financial relief while more fundamental alterations of the existing rate structure can be considered." Approval was subject to the understanding that the surcharge would expire after 90 days, and that the NYSE would restore full brokerage services for small investors and remove transaction size and other limitations on such accounts. Letter of Hamer H. Budge to Robert W. Haack, April 2, 1970. Approval was given on similar conditions to the Amex proposed rule 396, requesting a like interim surcharge. Letter of Irving M. Pollack to Ralph S. Saul, April 10, 1970. The terms of the surcharges were thereafter extended, SEC Securities Exchange Act Release 8923 (July 2, 1970), and expired in March (NYSE) and April (Amex) of 1972.

The recent SEC program which aims at gradual introduction of negotiated rates strongly enforces our view

that it would be unwise for a court to interfere under the antitrust laws. Although SEC Securities Exchange Act Release No. 8324 (May 28, 1968) contemplated the introduction of negotiated rates as an alternative to volume discounts, the Commission determined by October 22, 1970, that fixed charges on portions of orders in excess of $100,000 were—even when joined with volume discounts—neither necessary nor appropriate to achieving the purposes of the 1934 Act. Letter of Hamer H. Budge to Robert W. Haack, October 22, 1970; SEC Securities Exchange Act Release No. 9007 (Oct. 22, 1970). The Commission subsequently indicated that a $500,000 "breakpoint" would be acceptable, Letter of Richard B. Smith to Robert W. Haack, February 10, 1971; SEC Securities Exchange Act Release No. 9105 (March 11, 1971), and sent to the other exchanges copies of its correspondence with the NYSE regarding negotiated rates for their "appropriate consideration." Letter of Irving M. Pollack to the presidents of the American, Boston, Cincinnati, Detroit, Midwest, National, Pacific Coast, Philadelphia-Baltimore-Washington, Salt Lake, and Spokane Stock Exchanges, March 17, 1971. In its Statement on the Future Structure of the Securities Markets (Feb. 2, 1972), issued subsequent to the initiation of Gordon's lawsuit, the Commission announced its conclusion, grounded on the results of monitoring undertaken concurrently by the SEC and the exchanges, that a reduction in the breakpoint to $300,000 was appropriate, and commanded its implementation by April of 1972. Not long thereafter, SEC Securities Exchange Act Release No. 10383 (Sept. 11, 1973) decreed the end of all fixed commission rates by April 30, 1975. As a further step in the process of gradual abandonment, SEC Securities Exchange Act Release No. 10560 (Dec. 14, 1973) requested the immediate introduction of limited

price competition in transactions falling below the current breakpoint.

The Commission's program of measured introduction of negotiated rates has been carefully gauged to avoid undesirable side-effects on both the industry and the investing public. The Statement on the Future Structure of the Securities Markets, 15, cautions:

> We must bear in mind . . . that we are dealing with an industry which has operated under fixed commission rates for a very long time. It is necessary to measure the effect of competitively determined commissions very carefully on a step by step basis.

We are told, for example, that among the consequences certain to result from the introduction of negotiated rates across the boards is the failure of a number of inefficient brokerage firms. Baxter, *NYSE Fixed Commission Rates: A Private Cartel Goes Public,* 22 Stan. L. Rev. 675, 699 (1970). The SEC study revealed that the exchanges have operated for a long time under cartelized commission rates, which exceed those which would have been charged by firms of efficient scale. Thus, firms too small and inefficient to survive in a competitive market have so far been sheltered. Introduction of negotiated rates across the entire range of trades would, it is thought, cause many of these firms to go under. Baxter, *supra,* 22 Stan. L. Rev. at 699. Much of the damage resulting from such attrition would be borne by the investing public, to whom failing member firms would be indebted in the form of credit balances. Measured withdrawal could avoid the loss of those investor funds by allowing failing brokers to "exit by orderly merger or liquidation rather than by bankruptcy." Note, *Fixed Brokerage Commissions: An Antitrust Anal-*

ysis After the Introduction of Competitive Rates on Trades Exceeding $500,000, 85 Harv. L. Rev. 794, 811 (1972).

We have recounted at such length the Commission's actions on brokerage rate changes not solely to demonstrate the extraordinarily active surveillance by the Commission, in accordance with Congress's expressed declaration, nor even to establish that the invocation of antitrust jurisdiction would result in repetition of and conflict with SEC action. Of greater importance, it seems to us, is the reminder it offers that when something as crucial to the survival of the securities industry as its very ancient rate structure is at stake, diagnoses and changes must come from an agency with the Commission's expertise. The wisdom of the SEC's actions is, of course, not before us. We stress only that it is clear that, with respect to the fixing of commission rates, the process of administrative review in the first instance is far superior to judicial review.[8]

That Congress recognized agency superiority in this regard should not, moreover, come as a great surprise, for the courts themselves, by the time of the 1934 Act's passage, had admitted as much in abandoning the rule of reason approach to price-fixing. Indeed, the adoption of a standard of per se illegality in *Trenton Potteries* was thought necessary by the Supreme Court to relieve the

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8 By this we do not intend to imply that withdrawal of antitrust jurisdiction is based on the SEC's "primary" jurisdiction over the practices challenged by Gordon. *Cf. Thill Securities Corp.* v. *New York Stock Exchange*, 433 F.2d 264, 276-77 (7th Cir. 1970) (Swygert, J., concurring). As our earlier discussion of the language and history of the 1934 Act indicates, we are of the view that Congress intended to exempt commission rate-fixing from the operation of the antitrust laws, and consequently deprived the courts of even "secondary" jurisdiction to entertain Sherman Act claims like that which Gordon asserts. Judicial review of SEC action would, however, be proper, either under the Administrative Procedure Act, 5 U.S.C. §§ 702, 704 (1970), or pursuant to the provisions of the 1934 Act, 15 U.S.C. § 78y (1970).

judiciary of the need to determine the reasonableness of prices set by horizontal agreement. The Court there stated:

> In the absence of express legislation requiring it, we should hesitate to adopt a construction [of the Sherman Act] making the difference between legal and illegal conduct in the field of business relations depend upon so uncertain a test as whether prices are reasonable—a determination which can be satisfactorily made only after a complete survey of our economic organization and a choice between rival philosophies.

United States v. *Trenton Potteries*, 273 U.S. 392, 398 (1927). Such questions as the effect of fixed commission rates on trading volume and broker solvency, or the effect of competition on and the necessity for exchange membership, are not of the sort which courts can answer as well as the SEC. The statutory scheme exhibits congressional confidence that the Commission will be more capable of resolving problems of this nature.

We are not unmindful of the Seventh Circuit's decision in *Thill Securities Corp.* v. *New York Stock Exchange*, 433 F.2d 264 (7th Cir. 1970), heavily relied upon by Gordon and the Department of Justice as amicus curiae for appellant.[9] The claim there presented against the NYSE's anti-rebate rule is of a different character from Gordon's challenge to rate-fixing practices. For, as the *Thill* court stated, there was "no evidence as to the extent to which the challenged rule is subject to actual review by the SEC . . ." 433 F.2d at 270. Moreover, the anti-rebate practice, not specified in any of the twelve subsections of § 19(b), may not be within that core of antitrust immunity to which we have referred. But it is a fact that at the time *Thill* was decided, the SEC was conducting hearings into,

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9 The SEC has also filed a brief as amicus curiae for the appellees.

among other matters, the "economic access to exchange markets by nonmembers broker-dealers . . ." SEC Securities Exchange Act Release No. 8324 (May 28, 1968). And it would be difficult to maintain that the effect of the anti-rebate rule on investor protection, fair dealing in securities, or fair administration of an exchange is in any significant respect different from the practice of commission rate-fixing.[10] *See* Note, *Antitrust Laws and the Securities Exchanges*, 66 Nw. U.L. Rev. 100, 106 n. 40 (1971). Thus, to the extent our decision today is inconsistent with *Thill*, we find ourselves constrained to disagree with the holding there announced.[11]

We emphasize that the conclusion we reach today by no means implies that Gordon at no time may have access to the courts. After Commission action, judicial review of its decision is proper pursuant to the provisions of the Ad-

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10 As such, it would appropriately fall within the rule which we today announce, under the language of § 19(b)(13), 15 U.S.C. § 78s(b)(13) (1970) ("similar matters").

11 Judge Campbell in *Thill* relied heavily upon *United States* v. *Philadelphia National Bank*, 374 U.S. 321 (1963) for the proposition that implied exemption from the antitrust laws was *a fortiori* improper on the facts before the court. 433 F.2d at 272. In *Philadelphia National Bank* the Court held that, despite the congressionally required approval of the Comptroller of the Currency, pursuant to the Bank Merger Act of 1960, 12 U.S.C. § 1828 (1970), a merger between the Philadelphia National Bank and Girard banks remained subject to antitrust action by the Department of Justice.

Although we are not unmindful of the disfavor with which antitrust exemption is generally regarded, *see, e.g.*, *California* v. *Federal Power Commission*, 369 U.S. 482 (1962), we perceive significant differences between *Philadelphia National Bank* and the case which we today decide. We note that the history of the Bank Merger Act evidenced a congressional intent not to immunize bank mergers from at least Sherman Act attack, *see* 374 U.S. at 352, whereas the 1934 Act entrusts the SEC with supervision of rate-fixing, a practice which outside the confines of the 1934 Act is a per se violation of the Sherman Act. *Cf. Silver* v. *New York Stock Exchange*, 373 U.S. at 347-49 (recognizing that a group boycott carried out within the framework of the 1934 Act is not a per se antitrust violation).

ministrative Procedure Act, 5 U.S.C. §§ 702, 704 (1970), *see Independent Broker-Dealers' Trade Association* v. *SEC*, 442 F.2d 132 (D.C. Cir.), *cert. denied*, 404 U.S. 828 (1970), and, in the case of Commission orders, under the provisions of the 1934 Act, 15 U.S.C. § 78y (1970). On such review, a court is competent to consider, in accordance with standards appropriate for review of agency action, *see* Administrative Procedure Act § 10(e), 5 U.S.C. § 706 (1970), the weight given by the Commission to competitive factors in achieving the goals of the 1934 Act.

For the reasons stated, we affirm the district court's grant of summary judgment and dismissal of Gordon's claim.

Affirmed.